

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

JOANN SANDERS and  
JOHN E. SANDERS,  
Husband and Wife,

Plaintiffs

v.

CIVIL ACTION NO. 2:07-0322

STATE FARM INSURANCE COMPANY,

Defendant

MEMORANDUM OPINION AND ORDER

Pending is defendant's motion seeking leave to appear and defend plaintiffs' complaint in the name of an underinsured tortfeasor, filed July 30, 2007. The plaintiffs oppose the motion.

I.

On November 28, 2005, plaintiffs Joann and John Sanders were involved in a head-on collision with a vehicle owned and operated by Steven Jason Neil. (Def.'s Mem. Supp. Mot. 1). Mr. Neil's automobile was insured by defendant State Farm Mutual Automobile Insurance Company ("State Farm") under a \$50,000 liability coverage policy. (Compl. ¶ 8). Plaintiffs also were insured by State Farm. (Id. ¶ 10). Their policy included

\$100,000 of underinsured motorist coverage. (Id.).

After the accident, plaintiffs settled with State Farm for the full \$50,000 value of Mr. Neil's policy. (Id. ¶ 9). State Farm, acting as plaintiffs' underinsured motorist carrier, consented to this settlement and waived its subrogation rights. (Id. ¶ 11).

Plaintiffs then filed an underinsured motorist claim under their policy with State Farm contending that their damages exceeded \$50,000. (Def.'s Mem. Supp. Mot. 2). Attempts to negotiate a settlement of this claim were unsuccessful, and plaintiffs instituted an action against State Farm in the Circuit Court of Kanawha County on April 11, 2007. (Pls.' Mem. Opp'n to Def.'s Mot. 2). State Farm answered on May 18, 2007, reserving the right to defend in the name of Mr. Neil, then removed on diversity grounds on May 21, 2007.<sup>1</sup> (Answer ¶ 19).

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<sup>1</sup> Although not raised by the parties, the court notes that plaintiff is a West Virginia citizen and that defendant State Farm, which is a citizen of Illinois, seeks to defend under the name of Mr. Neil, who is also a citizen of West Virginia. (Compl. ¶ 1; Def.'s Mem. Supp. Mot. 7-8). At first blush, this would appear to raise a question of this court's subject matter jurisdiction.

However, the court considers only the citizenship of the real parties in interest in determining diversity jurisdiction. Roche v. Lincoln Prop. Co., 373 F.3d 610, 613 (4th Cir. 2004). It must disregard the citizenship of nominal parties. Id. If the court were to add Mr. Neil as a party to the case, he would

II.

Defendant State Farm contends that West Virginia Code § 33-6-31(d) gives it an absolute statutory right as the carrier of the underinsured motorist coverage to defend in the name of the underinsured tortfeasor. (Def.'s Mem. Supp. Mot. 2-3). Plaintiffs, on the other hand, assert that this code section provides State Farm with a "conditional right" dependent upon an action being filed against the tortfeasor. (Pls.' Mem. Opp'n to Def.'s Mot. 4-5). According to plaintiffs, State Farm forfeited its right to defend in the tortfeasor's name when it consented to the settlement and waived its subrogation rights. Id.

The pertinent part of West Virginia Code § 33-6-31(d) provides that:

Any insured intending to rely on the coverage required by subsection (b) of this section [relating to uninsured/underinsured motorist coverage] shall, if any action be instituted against the owner or operator of an uninsured or underinsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy,

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be a nominal party. See Tilley v. Allstate Ins. Co., 40 F. Supp.2d 809 (S.D. W. Va. 1999). Because he is treated as a nominal party for purposes of this order, subject matter jurisdiction is present.

in the manner prescribed by law, as though such insurance company were a named party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name.

W. Va. Code § 33-6-31(d)(West 2007)(emphasis added).

This section of the West Virginia Code provides uninsured/underinsured motorist carriers with certain rights when an uninsured or underinsured tortfeasor is sued, namely, the rights to notice of the complaint and to defend in either the carrier's own name or the tortfeasor's name. State ex rel. Allstate Ins. Co. v. Karl, 190 W. Va. 176, 181, 437 S.E.2d 749, 754 (1993) (citing Postlethwait v. Boston Old Colony Ins. Co., 189 W. Va. 532, 535, 432 S.E.2d 802, 805 (1993)). The West Virginia Supreme Court of Appeals has observed that the purpose of this section "is to protect an uninsured/underinsured insurance carrier from having a judgment entered against the uninsured/underinsured tortfeasor without the carrier having an opportunity to defend the suit," which is significant because the carrier will be responsible for all or part of the judgment. Postlethwait, 432 S.E.2d at 805.

The West Virginia Supreme Court of Appeals in Postlethwait has interpreted this section of the code as

applicable only when the plaintiff sues the uninsured/underinsured tortfeasor, and not when the plaintiff settles with the tortfeasor and the underinsured motorist carrier waives its right to subrogation. Id. (distinguishing the facts in Postlethwait, in which the plaintiff and the tortfeasor settled, from those in Davis v. Robertson, 175 W. Va. 364, 332 S.E.2d 819 (1985), in which plaintiff sued the tortfeasor).<sup>2</sup> In Postlethwait, the court noted:

It is well to emphasize again that W.Va.Code, 33-6-31(d), deals only with the situation where the plaintiff has sued the uninsured/underinsured tortfeasor. We have not found any provision in the uninsured/underinsured section of W.Va.Code, 33-6-31, that contains a procedure for suing an uninsured/underinsured carrier where a settlement was made with the tortfeasor's liability carrier for the full amount of the policy limits, as is the issue in this case.

Id. at 805.

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<sup>2</sup> Defendant cites State ex rel. State Farm Auto. Ins. Co. v. Canady, 197 W. Va. 107, 475 S.E.2d 107 (1996), for the proposition that an underinsured motorist carrier has an absolute right to choose to defend in either its own name or the name of the underinsured tortfeasor. (Def.'s Mem. Supp. Mot. 3). In Canady, the plaintiff sued the tortfeasor, and the insurance company sought to appear in its own name. Id. at 109. In Canady, § 33-6-31(d) applied because the plaintiff had sued the tortfeasor, and the court permitted the insurance company to choose the name in which it wished to appear. Id. at 110.

The facts of Canady are, quite plainly, factually distinguishable from those in a case in which a plaintiff settles with the tortfeasor and no action is filed against the tortfeasor.

In cases in which § 33-6-31(d) is inapplicable, such as where the plaintiff has settled with the tortfeasor's liability insurance carrier, the West Virginia Supreme Court of Appeals permits a plaintiff to sue the underinsured motorist carrier directly. Postlethwait, 432 S.E.2d at 805. For example, in Postlethwait, plaintiffs were involved in a car accident and negotiated a settlement with the tortfeasor's insurance carrier for the full value of the tortfeasor's liability coverage. Id. at 804. The plaintiffs there presented this settlement to Boston Old Colony Insurance Company ("Boston"), plaintiffs' underinsured motorist carrier, and Boston waived its subrogation rights. Id. Plaintiffs then instituted an action against Boston under their underinsured motorist policy. Id. In response to Boston's argument that a judgment against the tortfeasor was "a necessary precondition to an underinsured motorist suit," the court held that:

A plaintiff is not precluded under W. Va. Code § 33-6-31(d) from suing an uninsured/underinsured insurance carrier if the plaintiff has settled with the tortfeasor's liability carrier for the full amount of the policy and obtained from the uninsured/underinsured carrier a waiver of its right of subrogation against the tortfeasor.

Id. at 804, 807. The court found significant the fact that Boston consented to the settlement with the tortfeasor and waived

its right of subrogation, and thus it held that the Postlethwaits were not precluded from suing Boston directly. Id. at 805-806.

### III.

Here, because plaintiffs Joann and John Sanders have not instituted an action against Mr. Neil, the tortfeasor, West Virginia Code § 33-6-31(d) does not apply, and State Farm's rights under that Code section are unavailable.<sup>3</sup> Postlethwait, 432 S.E.2d at 805. Moreover, as in Postlethwait, defendant waived its subrogation rights. (Compl. ¶ 7). Because plaintiffs secured this waiver, they may institute an action under the terms of their underinsured motorist policy against State Farm directly. Postlethwait, 432 S.E.2d at 807.

State Farm could have protected its right to be sued in the tortfeasor's name by refusing to waive its subrogation

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<sup>3</sup> In fact, State Farm's § 33-6-31(d) rights are unnecessary under the present facts. As stated above, the purpose of § 33-6-31(d) "is to protect an uninsured/underinsured insurance carrier from having a judgment entered against the uninsured/underinsured tortfeasor without the carrier having an opportunity to defend the suit." Postlethwait, 432 S.E.2d at 805. Here, State Farm has the opportunity to defend. Because no judgment has been entered on the issues of liability and damages, plaintiffs must still prove both issues and State Farm will be able to defend. Postlethwait, 432 S.E.2d at 806.

rights, thereby forcing plaintiffs to institute an action against Mr. Neil and triggering the applicability of § 33-6-31(d). See Postlethwait, 432 S.E.2d at 807. Inasmuch as State Farm waived its subrogation rights, it forfeited its opportunity to assert its rights under § 33-6-31(d).

State Farm argues that the holding in Postlethwait is limited and does not apply to the facts here. (Def.'s Mem. Supp. Mot. 5-8). In support of this argument, defendant relies on two opinions issued by the United States District Court for the Southern District of West Virginia, Smith v. Westfield Ins. Co., 932 F. Supp. 770 (S.D. W. Va. 1996), and Tilley v. Allstate Ins. Co., 40 F. Supp.2d 809 (S.D. W. Va. 1999). The analysis in both Smith and Tilley rests upon an unpublished opinion of the West Virginia Supreme Court of Appeals, Dowler v. Reed, No. 21960, slip op. at 4 (W. Va. Dec. 10, 1993), in which the court stated, "we have not expanded that principle [referring to the holding of Postlethwait] to one that would grant the plaintiff an absolute right to sue his own underinsurance carrier in every situation wherein a settlement with a tortfeasor's insurer and a waiver of subrogation rights have been obtained."

The court in this case does not rely on Dowler, however, because the West Virginia Supreme Court of Appeals has



held that its unpublished opinions "are of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case." Pugh v. Workers' Comp. Comm'r, 188 W. Va. 414, 424 S.E.2d 759, syl. pt. 3 (1992). The court, accordingly, applies the precedent set forth in Postlethwait that a plaintiff is not precluded by § 33-6-31(d) from suing an uninsured/underinsured insurance carrier if, as here, the plaintiff has settled with the tortfeasor's liability carrier for the full amount of the policy and obtained from the uninsured/underinsured carrier a waiver of its right of subrogation against the tortfeasor. Id. at 807. The court concludes that § 33-6-31(d) does not apply here, and thus State Farm is not entitled to the rights provided therein. Like the plaintiffs in Postlethwait, Mr. and Mrs. Sanders, having settled with the tortfeasor, are not precluded from suing their underinsured motorist carrier directly and in its own name.

State Farm also contends that it will be prejudiced if not permitted to defend in the tortfeasor's name because "the issue of insurance will necessarily be injected into the trial of the case." (Def.'s Mem. Supp. Mot. 3). This argument is unavailing, however, because an insurance contract and an

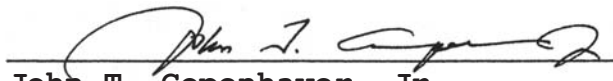
insurance company's duties under it are the heart of this case. Furthermore, the West Virginia Supreme Court of Appeals has found that "the current consensus [is] that the introduction of insurance is not per se prejudicial and that the potential for prejudice can be rectified with sound trial management precautions, including a limiting instruction." Canady, 475 S.E.2d at 114.

IV.

Accordingly, the court ORDERS that defendant's motion seeking leave to appear and defend plaintiffs' complaint in the name of the underinsured tortfeasor be, and it hereby is, denied.

The Clerk is directed to forward copies of this memorandum opinion and order to all counsel of record.

DATED: September 18, 2007

  
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John T. Copenhaver, Jr.  
United States District Judge